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IN THE
Supreme Court of The United States
OCTOBER TERM, 1999

BOY SCOUTS OF AMERICA AND
MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,

v.

JAMES DALE,
Respondent.

On Petition for a Writ of Certiorari
To the Supreme Court of New Jersey

BRIEF OF PUBLIC ADVOCATE OF THE UNITED STATES AND LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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Boyle, P., *Scout's Honor* (Rockland, Calif.: Prima Publishing, 1984). 19

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Masters, W., and Johnson, V., *Human Sexual Inadequacy* (Boston: Little, Brown and Company, 1970) 18

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INTEREST OF AMICI CURIAE

Amici curiae, Public Advocate of the United States and the Lincoln Institute for Research and Education, are nonprofit educational organizations sharing a common interest in the proper construction of the Constitution and laws of the United States.[1] Both *amici* were established in the District of Columbia within the past twenty years for public education purposes

[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief.

related to participation in the public policy process. For each of the *amici*, such purposes include programs to conduct research, and to inform and educate the public on important issues of national concern, including questions related to the original intent of the Founders and the correct interpretation of the United States Constitution. In the past, the *amici* have conducted research on other issues involving constitutional interpretation and filed *amicus curiae* briefs in other federal litigation involving constitutional issues.[2]

SUMMARY OF ARGUMENT

The decision below is in conflict with this Court's unanimous decision in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995). It also conflicts with this Court's rulings recognizing a constitutional right of association independent of "intimate" and "expressive" associations. Finally, it conflicts with this Court's rulings limiting governments to the imposition of content-neutral time, place and manner regulations upon the right of the people peaceably to assemble. If allowed to stand, the decision below will not only spawn confusion regarding the proper application of the First Amendment to claims of freedom of association, but will jeopardize fundamental constitutional principles long established by this Court.

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[2] *Amici* requested and received the written consents of the parties to the filing of this brief *amicus curiae*. Such written consents, in the form of letters from counsel of record for the various parties, have been submitted for filing to the Clerk of Court.

ARGUMENT

INTRODUCTION

On August 4, 1999, the New Jersey Supreme Court ruled that the Monmouth Council of the Boy Scouts of America (hereinafter "Boy Scouts") was a "place of public accommodation" within the meaning of the state's law against discrimination. Having so ruled, the court concluded that the Boy Scouts could not refuse to allow a publicly professed homosexual man from serving as a Scoutmaster because New Jersey law prohibits discrimination based upon "affectional or sexual orientation" in places of public accommodation.[3]

The Boy Scouts failed to convince the New Jersey Supreme Court that it fit within one of three statutory exceptions, and failed to persuade the court that the First and Fourteenth Amendments protected it from being compelled to accept a man in a leadership position that it viewed as antithetical to the Boy Scout Oath and Law. Based on its reading of this Court's opinions in Roberts v. United States Jaycees, 468 U.S. 609 (1984), Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987), and New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988), the New Jersey Supreme Court rejected the Boy Scouts' freedom of association argument. The state court found that the Boy Scouts failed to demonstrate "a protectable intimate association right under the First Amendment" and, further, that the Scouts' "right of

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[3] *See* Dale v. Boy Scouts of America, 160 N.J. 562, 734 A. 2d 1196 (1999). That opinion is included at pages 1a-101a of Appendix A to the Petition for a Writ of Certiorari herein. Further references to that opinion in this brief will be designated, with the appropriate appendix page reference, as "N.J. Op."

expressive association" would not be affected in any "significant way." N.J. Op., pp. 50a, 56a.

Moreover, the New Jersey justices found that New Jersey had a "compelling interest ... to eliminate the destructive consequences of [sexual orientation] discrimination from our society," which, they observed, the State legislature had found to "menace ... the institutions and foundations of a free and democratic state." N.J. Op., p. 62a. Because of their opinion that New Jersey's Law Against Discrimination based upon "affectional and sexual orientation" was one designed to combat "ignorance and prejudice" founded on nothing but "'archaic' and 'stereotypical notions' about homosexuals," the justices concluded that the Boy Scouts' First and Fourteenth Amendment rights could be "abridged" if necessary to accomplish the state's anti-discrimination purpose. *Id.*, pp. 62a-64a.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S HOLDING AND PRINCIPLES IN *HURLEY.*

As petitioners have ably demonstrated, the decision below directly conflicts with this Court's unanimous decision in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995). In Hurley, this Court reversed the Massachusetts Supreme Judicial Court, holding that requiring private organizers of a parade to permit a gay rights group to march in the parade violated the organizers' First Amendment rights. Ignoring the balancing test utilized in Roberts v. United States Jaycees, 468 U.S. 609 (1984), this Court determined that the state's public accommodations law, as applied to South Boston's St. Patrick's Day Parade, "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his message." Hurley, *supra*, 515 U.S. at 573.

Applying the lessons of Hurley, the New Jersey Supreme Court likewise should have determined that the petitioners must not be forced into changing the Boy Scouts' message by requiring them to include an individual as a member and leader whose avowed homosexuality is at odds with that message. Nevertheless, that court decided otherwise, based in part on its disapproval of the Boy Scouts' message. *See* N.J. Op., pp. 58a-62a, 64a-67a. In Hurley, this Court avoided basing its decision on its approval or non-approval of either party's message, relying on the time-honored speech principle that "shield[s] ... those choices of content that in someone's eyes are misguided, or even hurtful." Hurley, *supra,* 515 U.S. at 574.

The same standard of review and a similar analysis should obtain in this case. Not only is respondent's avowed homosexual identity inconsistent with the Boy Scouts' external message, his role as a Boy Scout leader would interfere with the internal communication of that message. As this Court observed in Hurley, marchers in a "parade" make "some sort of collective point ... to each other" as well as "to bystanders along the way." *Id.*, 515 U.S. at 568. Thus, the right of "speaker autonomy" does not turn on the existence of "a narrow succinctly articulable message" to outsiders, but upon the absolute right to select the "contingents to make a parade...." *Id.*, 515 U.S. at 569-70.

The New Jersey Supreme Court completely missed this aspect of the First Amendment, denying to the Boy Scouts the right to select the "contingents" to constituting a Boy Scout troop, solely because, in the court's opinion, the Boy Scout Oath and Law had failed to "disseminate" to outsiders a concrete and specific-enough message "that homosexuality is immoral...." *See* N.J. Op., p. 64a. According to Hurley, it is not for the courts or any other government official to grant or

deny First Amendment rights "based on the content" of what is, or is not, said. Hurley, *supra,* 515 U.S. at 575, 579.

Without question, the New Jersey courts below misapplied this Court's ruling in Hurley, opting instead to apply a different set of rules governing "freedom of association" purportedly derived from a trilogy of this Court's opinions beginning with Roberts v. United States Jaycees, *supra.* The New Jersey Supreme Court applied these cases not only in conflict with Hurley, but in conflict with the original text of the First Amendment and this Court's traditional decisions protecting the right of association that pre-dated Roberts. Such conflicts provide additional reasons for this Court to grant the Boy Scouts' petition for review.

II. THE DECISION BELOW CONFLICTS WITH THE FIRST AMENDMENT'S RIGHT TO ASSEMBLE.

In Roberts v. United States Jaycees, *supra,* 468 U.S. at 522, this Court identified the First Amendment "right of association" "as implicit in the right to engage in activities protected by" that Amendment. Thus, this Court, in Roberts, treated "the right of association" as "correlative" to such express rights as "freedom to speak, to worship and to petition the government for redress of grievances...." *Id.* As a "correlative" right, some lower courts, citing Roberts, have insisted that any person who claims a First Amendment constitutional right to associate must claim and prove his right to an "intimate association" or must demonstrate that the association is for "expressive purposes." *See, e.g.*, Sanitation and Recycling Industry, Inc. v. City of New York, 107 F. 3d 985, 996 (2d Cir. 1997); Griffin v. Strong, 983 F. 2d 1544, 1546 (10th Cir. 1993); Winik-Nystrup v. Manufacturers Life Insurance Co., 8 F. Supp. 2d 1, 10-23 (D. Conn. 1998). That is precisely what the New Jersey Supreme Court did in this case.

In a section of the opinion below labeled, "Freedom of Expressive Association," the New Jersey justices conducted their First Amendment analysis of the Boy Scout policy with respect to open, avowed homosexuals **solely** in relation of that policy to the "dissemination" of the Boy Scout message:

> We find that the LAD [Law Against Discrimination] does not violate Boy Scouts' freedom of expressive association because the statute does not have a significant impact on Boy Scout members' ability to associate with one another in pursuit of shared views. The organization's ability to **disseminate** its message is not significantly affected by Dale's exclusion because Boy Scout members do not associate for the purpose of **disseminating** the belief that homosexuality is immoral; Boy Scouts discourages its leaders from **disseminating any** views on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views in respect to homosexuality. [N.J. Op., p. 52a (emphasis added).]

Within this framework of analysis, the New Jersey court dismissed the petitioners' claim that the Boy Scout Oath and Law requires the exclusion of avowed homosexual Scoutmasters because the Oath and the Law do not "on their face, express anything about sexuality, much less that homosexuality, in particular, is immoral." N.J. Op., p. 56a. Finding that "no single view" on the "subject" of sexual morality "functions as a unifying associational goal of the organization," the court held that requiring the Boy Scouts to welcome an open, avowed homosexual Scoutmaster into its ranks "does not violate Boy Scouts' right of expressive association because his inclusion would not 'affect in any significant way [Boy Scouts] existing members' ability to carry out their various purposes.' Rotary Club, *supra*, 481 U.S. at 548...." N.J. Op., p. 56a.

Having limited its analysis of the Boy Scouts' claim of freedom of association to its "correlative" roles recognized in the Roberts and Rotary Club cases, the New Jersey court failed to abide by this Court's long line of cases which recognize a constitutional right of freedom of association **independently** rooted in "the right of the people peaceably to assemble," as expressed in the First Amendment and understood by America's founders.

In the seminal case of DeJonge v. Oregon, 299 U.S. 353, 364 (1937), this Court ruled that the right of the people peaceably to assemble was "a right **cognate** to those of free speech and free press and is **equally** fundamental." (Emphasis added.) As an "equal and cognate" right, the Court affirmed its earlier observation in United States v. Cruikshank, 92 U.S. 542, 552 (1876), that the right of the people to assemble was the right of "'citizens to meet peaceably **for consultation** in respect to public affairs....'" *Id.* (Emphasis added.) Thus, this Court embraced the historic understanding that the foundational purpose of the right of the people peaceably to assemble was to "**consult** for their common good." Article XVI of the August 16, 1776 Constitution of Pennsylvania reprinted in Sources of Our Liberties 331 (Perry, ed., American Bar Foundation, 1972) (emphasis added).

Two years after the DeJonge decision, in Hague v. CIO, 307 U.S. 496 (1939), Justice Owen Roberts, in an opinion concurred in by Justice Hugo Black, engaged in an extensive review of the nature and application of the right of the people peaceably to assemble. First, in posing the question before the Court, Justice Roberts made clear that the issue of peaceable assembly related to "**dissemination** [of] information [about] and **discussion** of the [National Labor Relations] Act, and of the opportunities and advantages offered by it...." *Id.*, 307 U.S.

at 512 (emphasis added). Second, relying on Cruikshank, *supra*, Justice Roberts linked the labor act's policy of "freedom of association" to the constitutional "right peaceably to assemble and to **discuss** ... and **communicate**...." *Id.*, 307 U.S. at 512-13 (emphasis added). Finally, Justice Roberts reached his conclusion, often referred to and relied upon by this Court up to the present day:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, **communicating** thoughts between citizens and **discussing** public questions. [*Id.*, 307 U.S. at 515 (emphasis added).]

Justice Roberts' understanding of the consultative purpose of the people's right of assembly not only conformed to this Court's "right of association" cases in Cruikshank and DeJonge, but also was a focus of this Court's freedom of association rationale in case after case prior to the decision in Roberts v. United States Jaycees, *supra*. Relying explicitly upon Justice Roberts' opinion in Hague, this Court ruled in Thomas v. Collins, 323 U.S. 516, 532 (1945), that "[t]he right to **discuss**, and **inform** people concerning the advantages and disadvantaged of unions and joining them is protected ... as part of free assembly" (emphasis added). Later, the Court returned to this theme, concluding that "the right either of workmen or of unions ... to assemble **and discuss their own affairs** is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others to assemble and discuss their affairs and enlist the support of others." *Id.*, 323 U.S. at 539 (emphasis added).

In a series of cases involving the NAACP, this Court struck a similar note in its assessment of the purpose of the right of

association. In NAACP v. Alabama, 357 U.S. 449, 460, 466 (1958), this Court, emphasizing the importance of protecting "the rights of [NAACP's] rank-and-file members to engage in lawful association in support of their common beliefs," whether they be "political, economic, religious or cultural," relied upon **both** the speech and the assembly clauses for its ruling that "the right of the members to pursue their **lawful private interests privately** and to associate with others in doing so ... come[s] within the protection of the Fourteenth Amendment" (emphasis added). In NAACP v. Button, 371 U.S. 415, 428, 431, 437, 444-45 (1963), this Court repeatedly treated freedom of "association" as a separate and distinct freedom from that of "expression." As for the former freedom, the Court observed that the Virginia rule against lawyer solicitation created "the gravest danger of smothering all **discussion** looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority." *Id.*, 371 U.S. at 434-37 (emphasis added). Nineteen years later, in NAACP v. Claiborne Hardware Co., 458 U.S. 886, 909 (1982), this Court continued to recognize that the right to "assemble peaceably" was distinct from the freedom of speech, the former primarily protecting the right of the NAACP to "**discuss among themselves** their grievances against governmental and business policy." (Emphasis added.)

To collapse this distinctive freedom of association into one of "expressive association," as the New Jersey courts did below, disregards these venerable authorities. By failing to utilize the traditional applications of the right to associate, independently grounded in the right of the people peaceably to assemble, the Roberts and Rotary Club opinions unwittingly opened the door to the very government intrusions that the Assembly Clause was designed to prohibit. Instead of the people deciding with whom they will associate to discuss and advance common beliefs pertaining to "political, economic,

religious or cultural matters," governments have been given license to impose their views of political, economic, religious and cultural orthodoxy, so long as they purport to do so in the cause of eliminating "invidious discrimination."

In his concurring opinion in Thomas v. Collins, *supra,* Justice Robert Jackson warned that the government would invent all kinds of reasons to intrude upon the right of the people to associate, but that the courts must remain vigilant to insure that the right of the people to assemble does not become a "hollow one." *Id.*, 323 U.S. at 547.

The New Jersey Supreme Court opinion below illustrates the "hollowness" of a constitutional right of association if limited to the "correlative" right of freedom of association, recognized in the Roberts/Rotary Club/New York State Club line of cases. By focusing exclusively upon the "expressive" aspect of Scouting, the New Jersey judges were enabled to disregard completely the internal camaraderie of the organization, and thus to discard the essential role that common beliefs and attitudes must play to ensure freedom of association. *See* NAACP v. Button, *supra,* 371 U.S. at 429-31.

III. THE DECISION BELOW CONFLICTS WITH THE CONSTITUTIONALLY-PERMISSIBLE LIMITS ON FREEDOM OF ASSOCIATION.

According to the express language of the Assembly Clause, there is only one constitutionally-permitted condition that governments may impose without "abridging" the right of the people to assemble. That condition is that the assembly must be "peaceable." In its seminal decision in DeJonge v. Oregon, *supra*, this Court overruled a criminal conviction under a state syndicalism act because there was not a scintilla of evidence of an "incite[ment] to violence and crime." By so ruling, this

Court rejected the State's attempt to criminalize conduct simply because it was engaged in under the auspices of an organization which taught and advocated the violent overthrow of the government. As dangerous as such teaching was to the stability of the government, this Court stood firm in favor of "the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means." *Id.*, 299 U.S. at 365.

By demanding explicit proof of breach of the peace in DeJonge, this Court forged a legacy of constitutional protection from government intrusions upon the freedom of assembly and association that prevailed through the civil rights movement of the 1960's. Thus, in Cox v. Louisiana, 379 U.S. 536, 538-52 (1965), this Court struck down a conviction under a "breach of the peace" statute because there was no evidence of any threat to the physical peace of the community. In the same case, this Court struck down a conviction under an "Obstructing Public Passages" statute because there was evidence that it had been enforced in a discriminatory manner inconsistent with this Court's insistence upon an idea-neutral policy of "time, place and manner." *Id.*, 379 U.S. at 553-58.

This Court's insistence upon real evidence of a threat to the community's physical well-being has not been confined to cases applying criminal statutes to public assemblies. In NAACP v. Alabama, *supra*, 357 U.S. at 465, the Court rejected Alabama's effort to obtain the membership list of the Alabama chapter of the NAACP, distinguishing an earlier decision approving a New York law requiring disclosure of membership in the Ku Klux Klan on the ground that "the Klan's activities ... involv[ed] acts of unlawful intimidation and violence."

Beginning in the 1960's, however, and continuing to the present day, this Court has sometimes departed from this narrow test of constitutional permissibility, opting for a broader, more flexible test, namely, whether "a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." NAACP v. Button, *supra*, 371 U.S. at 438.

Application of the "compelling state interest" test, first formulated and applied by this Court in equal protection cases, has not been without controversy. As early as 1969, Justice John Marshall Harlan cautioned this Court to use the test sparingly, limiting it to cases involving race discrimination. Shapiro v. Thompson, 394 U.S. 618, 658-62 (1969) (Harlan, J., dissenting).

More recently, Justice Anthony Kennedy has voiced concern about the indiscriminate use of the compelling state interest test in First Amendment cases. In his concurring opinion in Simon & Schuster, Inc. v. New York State Crime Victims Board, 502 U.S. 105 (1991), Justice Kennedy reminded the Court, as had Justice Harlan before him, that the compelling state interest test "derives from our equal protection jurisprudence ... and has no real or legitimate place when the Court considers the straightforward question whether the State may enact a burdensome restriction of speech based on content only, apart from considerations of time, place, and manner of use of public forums." *Id.*, at 124. In a case decided upon the heels of Simon & Schuster, Justice Kennedy reiterated his concern, this time expressing his opinion that "our adoption of the compelling-interest test was accomplished by accident..., and as a general matter produces a misunderstanding that has the potential to encourage attempts to suppress legitimate expres-

sion." Burson v. Freeman, 504 U.S. 191, 212 (1992) (Kennedy, J., concurring).

Justice Kennedy has not been the sole voice expressing such concerns. In Roberts v. United States Jaycees, *supra*, 468 U. S. at 633, Justice Sandra Day O'Connor questioned this Court's "mechanical application of a 'compelling interest' test," and stated that the "First Amendment is offended by direct state control of the membership of a private organization engaged exclusively in protected expressive activity...." *Id.*, at 638. Referring to, *inter alia*, The Official Boy Scout Handbook, Justice O'Conner noted that "[e]ven the training of outdoor survival skills, or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." *Id.*, at 636. Freedom of association for such expressive associations, like the freedom of speech, should only be governed by "content-neutral state regulation of the time, place, and manner of any organization's relations with its members or with the State," and only then when such regulations are "'narrowly drawn' to serve a 'sufficiently strong, subordinating interest' 'without unnecessarily interfering with First Amendment freedoms.'" *Id.*, 468 U.S. at 634.

Finally, as discussed above, this Court unanimously eschewed application of the compelling state interest test in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995), relying instead upon the absolute principle of "speaker autonomy" to turn back an attempt to use the Massachusetts public accommodation law to overlook the freedom of speech in the name of "eradicating discrimination." In doing so, the Court deliberately refused to follow the lead of the lower court, which had applied the compelling state interest test on the authority of the Roberts case. *Id.*, 515 U S. at 563.

Had this Court done otherwise in Hurley, it would have been drawn into the kind of balancing of interests engaged in by the New Jersey Supreme Court below. After finding that the petitioners enjoyed the constitutional right of expressive association, the New Jersey justices opined that "[t]he right of expressive association must ... be weighed against" the compelling interest of the state to prevent "invidious discrimination" in each case. This probe led the state court, in turn, to determine the purpose of the Boy Scouts and the meaning of the Boy Scout Oath and Law, rather than to defend the right of the Boy Scouts to determine those for itself, thereby trampling on the very constitutional "autonomy"expressed and applied by this Court in Hurley.

Not only that, but the compelling state interest test led the New Jersey courts into a probing critique of the Boy Scouts' views on homosexuality, labeling them "archaic," "stereotypical" and "bigoted." N.J. Op., p. 62a. In contrast, the New Jersey courts have upheld the New Jersey legislature's views against discrimination on the basis of homosexuality or other sexual or affectional orientation as enlightened and commendable — a "recognition that discrimination based on 'archaic' and 'stereotypical notions' about homosexuals that bears no relationship to reality...." N.J. Op., p. 62a.

Only by relying upon the compelling state interest test could the New Jersey Supreme Court have justified a law that infringed upon the right of the Boy Scouts to hold views contrary to a state-imposed orthodoxy. Such viewpoint discrimination has been found by this Court to be *per se* a violation of the First Amendment. *See* Rosenberger v. University of Virginia, 515 U.S. 819 (1995). Yet, the compelling state interest test inevitably leads to such discrimination when applied to a law designed to prohibit certain acts of discrimina-

tion by an organization dedicated to views considered anathema by the state.

This point is best illustrated by an examination of New Jersey Supreme Court Justice Handler's concurring opinion in which, referring to the Roberts test, he declared that the state has a compelling interest to prohibit organizations from using "stereotypical assumptions about homosexuals" in determining its standards for membership:

> One particular stereotype that we renounce today is that homosexuals are inherently immoral.[4] That myth is repudiated by decades of **social science data** that convincingly establish that being homosexual does not, in itself, derogate from one's ability to participate in and contribute responsibly and positively to society.... Accordingly ... there is no reason to view "a gay scoutmaster, solely because he is a homosexual, [as lacking the] strength of character necessary to properly care for [and] impart BSA humanitarian ideals to the young boys in his charge." [N.J. Op., pp. 95a-96a (emphasis added).]

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[4] Armed with the "compelling state interest" broadax, Justice Handler chops down 6,000 years of Judaeo-Christian tradition and teaching. "Thou shalt not lie with mankind, as with womankind; it is abomination." Leviticus 18:22. "But the men of Sodom were wicked and sinners before the Lord exceedingly." Genesis 13:13. "And turning the cities of Sodom and Gomorrah into ashes condemned them with an overthrow, making them an ensample unto those that after should live ungodly." II Peter 2:6. "[F]or even their women did change the natural use into that which is against nature: And likewise also the men, leaving the natural use of the woman, burned in their lust one toward another; men with men working that which is unseemly...." Romans 1:26-27. While Justice Handler is within his province as a judge to decide what is unlawful, he has no authority to determine what is immoral.

Justice Handler's reliance on social science literature to defend his legal ruling would raise serious problems even if it accurately described a consensus of experts. But the experts do not agree. Social science data other than that cited by Justice Handler demonstrate the wisdom of a content-neutral First Amendment test. For example:

Dr. Judith Reisman found that adult homosexuals are far more likely to solicit teenaged sexual partners when compared to adult heterosexuals. "Partner Solicitation Language As A Reflection Of Male Sexual Orientation." Collected Papers from the NARTH Annual Conference, Saturday, 29 July 1995. In her analysis of "In Search Of" ("ISO") advertisements placed by males in two magazines, the *Washingtonian*, which is predominantly heterosexual in orientation, and *The Advocate*, which is predominantly homosexual, she found that under 1 percent of *Washingtonian* ISO advertisers as against 53 percent of *Advocate* ISO advertisers sought teens. She also found that on average only once a month did advertisers in *Washingtonian* seek a teenage girl, while 15 percent of the advertisers in *The Advocate* sought an average of 130 boys per month. *Id.*

Dr. Reisman's findings are supported by studies conducted by the homosexual community. In *Gay Report*, a survey of homosexual attitudes and behavior, homosexual researchers Jay and Young found that 73 percent of homosexuals surveyed had at some time had sex with boys sixteen to nineteen years of age or younger. K. Jay and A. Young, *The Gay Report* (New York: Summit Books, 1979), p. 275. Approximately one out of four homosexuals admitted to sex with children and younger teens. Jay and Young, p. 275; A.P. Bell and M.S. Weinberg, *Homosexualities: A Study of Diversity Among Men and Women* (New York: Simon & Schuster, 1978), p. 85.

Pedophilia plays a key role in the recruitment of future homosexuals. Regarding the homosexual recruitment process, noted sex researchers Masters and Johnson observed:

> In most instances, homophile interests developed in the early to midteens.... There was no history of overt heterosexual experience prior to homophile orientation. Recruitment usually was accomplished by an older male, frequently in his twenties, but occasionally men in their thirties were the initiators. When the homosexual commitment was terminated, in most instances, the relationship was broken by the elder partner. With termination, the teenager was left with the concept that whether or not he continued as an active homosexual, he would always be homophile-oriented. [W. Masters and V. Johnson, *Human Sexual Inadequacy* (Boston: Little, Brown and Company, 1970), pp. 179-180.]

In one study (Bell and Weinberg, *supra*, p. 87), over 60 percent of the respondents identified their first homosexual partner as someone older; in another (P. Gephard and A.P. Johnson, *The Kinsey Data: Marginal Tabulations of the 1958-63 Interviews Conducted by the Institute for Sex Research* (Indiana University Press: Bloomington, Ind., 1979), p. 495), over 64 percent of the respondents identified their first homosexual partner as having initiated the sexual experience.

During the period 1971 through November 1991, the Boy Scouts banned 1,871 individuals from Scouting for sexual abuse. P. Boyle, *Scout's Honor* (Rocklin, Calif.: Prima Publishing, 1984), p. 315. (Not all of these cases involved male scout leaders abusing male Scouts). At least 2,071 Scouts reported being abused by leaders, with another 2,737 victims who may or may not have been Scouts. Boyle, p. 316. It could be said that based on their experience as well as the social

science literature, the Boy Scouts would be violating the trust conferred on them by the parents of countless young boys if they allowed avowed homosexuals to continue in leadership roles, modeling their lifestyle to those impressionable boys, resulting in the very immoral behavior by those boys which the Boy Scout Oath and Law seek to avoid.

It is not for judges, much less state legislatures, to survey the sociological studies on homosexuality and, then, in pursuit of some ideal society without discrimination, force people to associate with each other only in conformity with the views endorsed by the civil authorities. The right to associate presupposes a right to refuse to associate with those who embrace antithetical values. Civilly-enforced associational conformity is the very evil that the Assembly Clause was designed to prevent, guaranteeing to the people the right to decide with whom they will associate so long as they conduct themselves in a manner that is consistent with the physical peace of the community.

During the 1950's and 1960's, this Court was called upon again and again to declare and apply the First Amendment to speeches, assemblies and petitions of people who actively opposed the racial views held by civil authorities in the South. During those tumultuous times, this Court applied content-neutral constitutional principles that did not permit it or any other court to take sides in the ongoing political debate. Rather, as in Edwards v. South Carolina, 372 U.S. 229, 235 (1963), it held the constitutional line protecting "free speech, free assembly and freedom to petition for redress of ... grievances ... in their most pristine and classic form." This Court did so because it adhered to the original principles of content neutrality unencumbered by the compelling interest test that invites an open-ended balancing of governmental interests against those of the individual. The case below presents an excellent

opportunity for this Court to reject the compelling interest test as having no permanent place in its First Amendment jurisprudence, and to return to its time-honored, content-neutral principles permitting the state to regulate people's assemblies only on the basis of necessary and narrowly-drawn time, place and manner restrictions.

CONCLUSION

For the reasons set forth above, Public Advocate of the United States and Lincoln Institute for Research and Education respectfully urge this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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